**TABARANI MOHD ARSAD & ANOR**

**v.**

**CHAN TENN YEU**

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 12-17-1997]
22 MARCH 1999

***TORT:*** *Negligence - Road accident - Collision between motorcyle and motorlorry - Collision occurred while overtaking - Liability - Contributory negligence - Whether respondent failed to trail motorlorry at safe distance - Conflicting versions - Duty of trial judge - Road Transport Act 1987, s. 43 - Highway Code, rr. 20, 22*

***DAMAGES:*** *Personal injuries - Multiple lacerations and degloving injury - Compound fracture of calcaneum and navicular bone - Multiple scars on heel and dorso lateral aspect of foot - General damages - Adequate quantum*

The respondent sued the appellants for negligence following an accident between a motorcycle ridden by the respondent and a motorlorry driven by the first appellant. In the court below, the respondent testified that he was at the material time trailing behind the motorlorry and wanted to overtake the motorlorry on the right side of the road. However, as he was approaching the middle portion of the motorlorry, the first appellant, in an apparent move to enter a side road, and without giving any light signal to turn right, turned the motorlorry to the right thereby causing his motorcycle to collide against the motorlorry. The first appellant's version was that he did give the light signal about five street lights away before turning to the right, and only turned right after looking into the side mirror and seeing no vehicle behind him.

The learned trial judge believed and accepted the version of the respondent, apparently without testing the discrepancies in such evidence, and attributed 75% of liability to the first appellant and 25% to the respondent. The facts also showed that, as a result of the accident, the respondent had *inter alia* suffered: (a) multiple abrasions/lacerations and degloving injury; (b) compound fracture of calcaneum and fracture of navicular bone; and (c) multiple scars on left heel and on dorso lateral aspect of his left foot. The learned trial judge, in the circumstances, awarded general damages of RM30,000, on the basis of 100% liability, comprising respectively of RM5,000 for injury (a), RM15,000 for injury (b) and RM10,000 for injury (c). The appellant appealed against the decision in respect of liability, while the respondent cross-appealed on the quantum of damages awarded.

**Held:**

**[1]** The trial court fell in error when it approached the case solely on the basis of deciding which story is to be believed. When confronted with two conflicting versions, the duty of the trial court was to consider which version was inherently probable or improbable. The trial court should have been more meticulous and and should also consider other probable versions provided they were within the scope of the pleadings and supportable by admissible evidence including the neutral ones.

**[2]** The trial court, in apportioning liability the way it did, failed to consider several relevant evidence, including the facts that: (a) the respondent was charged under s. 43 of the Road Transport Act 1987 based on the accident, which would weigh against the respondent; (b) a police report was lodged by the first appellant 30 minutes after the accident which therefore offered no opportunity for him to concoct or fabricate evidence; (c) inferences could be drawn from the sketch plan that the motorlorry had already turned to the right and was about to enter the side road when the motorcycle collided against it; and (d) the motorlorry had a heavy load and was moving on six tyres, and could not therefore make a sudden right turn as alleged.

**[3]** The version of the respondent that the motorlorry had suddenly turned to the right when he was at the centre of the body of the motorlorry, while in the process of overtaking, cannot at all be believed. With the heavy load, and measuring 14 feet in length and moving on six tyres, it was quite improbable that the motorlorry could make a sudden right turn as alleged. The sheer size of the motorlorry defies logic that it could suddenly turn to the right to engage a turning to the side road.

**[4]** In determining the liability of the protagonist in accident cases, there is a need to refer to the speed tables in *Bingham's Motor Claims Cases*. In this case, the respondent had clearly failed to abide by r. 22 of the Highway Code, as he failed to trail behind the motorlorry at a safe distance. A prudent motorcyclist would overtake the motorlorry on the left side when the driver of the motorlorry signalled his intention to turn to the right.

**[5]** There was contributory negligence on the part of the respondent on a higher scale in terms of percentage. The respondent, without doubt, was the author of his own misfortune. Consequently, the first appellant must be held 25% liable whilst the respondent, the principal actor, 75% liable.

**[6]** The trial court made a wholly erroneous estimate and failed to lay emphasis on the degloving injury in respect of the award for "multiple abrasions, laceration with laceration of the flap tissue left heel and degloving injury lateral aspect of left foot" sustained by the respondent. Degloving injury is a complete peeling of the top skin and this was indeed serious as compared to laceration. On the basis of comparables, the repondent should be awarded RM13,000 under this head. However, the assessment and award in respect of the respondent's loss of skin over the calcaneum and the dorso-lateral aspect, and the multiple scars sustained by him, was just and reasonable. The quantum of RM15,000 and RM10,000 respectively given under this head should not therefore be disturbed.

*[Respondent's cross-appeal partly allowed; general damages to be accordingly apportioned.]*

**Case(s) referred to:**

*Abdul Mokhti Hj Ahmad v. Idris Ibrahim [1977] 2 MLJ 85* ***(refd)***
*Azman Kasri & Anor v. Md Isa Endut & Kerajaan Malaysia [1988] 2 MLJ 28* ***(refd)***
*British Transport Commission v. Gourley [1956] AC 185* ***(refd)***
*Brown & Lynn v. Western SMT Co Ltd [1945] SC 31* ***(refd)***
*Challoner v. Williams & Croney [1975] 1 Lloyd's Report 124 CA* ***(refd)***
*Chan Peng Fook v. Kan Pak Lee [1974] 2 MLJ 197* ***(refd)***
*Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120* ***(refd)***
*Chua Chong Cher v. Teo Lang Keow & Ors [1970] 2 MLJ 27* ***(refd)***
*Davies v. Swan Motor Co (Swansea) LD James, Third Party [1949] 2 KB 291* ***(refd)***
*De Cotta v. Tan Hock Lee [1972] 2 MLJ 173* ***(refd)***
*Development & Commercial Bank Bhd v. Num Tjuan Sdn Bhd [1989] 1 MLJ 475* ***(foll)***
*Dewaramah Ellapin Widow & Beneficiary of Subramaniam Kaliappan v. Ibrahim Abdul Hamid & Anor [1989] 1 CLJ 18* ***(refd)***
*Govinda Raju & Anor v. Laws [1966] 1 MLJ 188* ***(refd)***
*Guan Soon Tin Mining Co v. Wong Fook Kum [1969] 1 MLJ 99* ***(refd)***
*Haron v. Macaulay [1969] 1 MLJ 169* ***(refd)***
*Jones v. Livox Quarries Ltd [1952] 2 QB 608* ***(refd)***
*Kek Kee Leng v. Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61* ***(refd)***
*Kelly v. Easi-Life Products [1954] CA 29B* ***(refd)***
*Khoo Lai Beng v. Sykt Binaan Noriswaty Sdn Bhd [1988] 2 MLJ 29* ***(refd)***
*Koay Teik Choo & Ors v. Reg [1956] 22 MLJ 52* ***(refd)***
*KR Taxi Service Ltd & Anor v. Zaharah & Anor [1969] 1 MLJ 49* ***(refd)***
*Lee Yew Hoe v. Lee Bock Huat [1980] 2 MLJ 271* ***(refd)***
*Lim Ah Toh v. Ang Yan Chee & Anor [1969] 2 MLJ 194* ***(refd)***
*Liong Thoo v. Sawiyah & Ors [1982] 1 MLJ 286* ***(refd)***
*Low Ah Whatt v. Phua Cheok Siong [1977] 2 MLJ 91* ***(refd)***
*MA Clyde v. Wong Ah Mei & Anor [1970] 2 MLJ 183* ***(refd)***
*Mohamad Mohamad Said & Anor v. Perianayagam & Anor [1972] 1 MLJ 67* ***(refd)***

*Mohamed Nordin Mohamad Zahari & Anor v. Kerajaan Malaysia & Anor [1993] 4 CLJ 451* ***(refd)***
*Mohamed Salleh Awang & Anor v. Low Han Leong & Anor [1982] 1 MLJ 82 FC* ***(refd)***
*Multar v. Lim Kim Chet & Anor [1982] 1 CLJ 107* ***(refd)***
*Ngooi Ku Siong & Anor v. Aidi Abdullah [1985] 1 MLJ 30* ***(refd)***
*Nicholas Arthur Nock v. Mohamed Ali Suleiman & Anor [1976] 1 MLJ 252* ***(refd)***
*Noorianti Zainol Abidin & Ors v. Tang Lei Nge & Tang Lye Chang [1990] 1 CLJ 943* ***(refd)***
*Ong Ah Long v. Dr S Underwood [1983] 2 MLJ 324* ***(refd)***
*Ooi Huah Beng v. Nizarullah Ahmad [1994] MMD 683* ***(refd)***
*Phuah Jee Suan v. Nila Vasu Pillai [1973] 1 MLJ 186* ***(refd)***
*PR Panickar v. Chwee May Kwong & Anor [1958] 24 MLJ 136* ***(refd)***
*Preen v. Post Office [1957] CA 30* ***(refd)***
*Rasidin Partorjo v. Frederick Kiai [1976] 2 MLJ 214* ***(refd)***
*Ravindran Veerasamy & Satu Lagi v. Harun Salleh [1993] 1 CLJ 23* ***(refd)***
*Red and Yellow Omnibus Co Sdn Bhd & Anor v. Chuah Lay Boon [1993] 2 CLJ 480* ***(refd)***
*Sepang Omnibus Sdn Bhd v. Christina Loh Soo Pang & Ors [1970] 2 MLJ 234* ***(foll)***
*Sulaiman Chik v. Ang Ah Choo [1989] 2 CLJ 492* ***(refd)***
*Tay Tong Chew & Anor v. Abdul Rahman Hj Ahmad [1985] 1 MLJ 50* ***(refd)***
*Thompson v. Spedding [1973] RTR 312* ***(refd)***
*Wan Norsiah Wan Abdullah v. Che Harun Che Daud [1980] 1 MLJ 237* ***(refd)***
*Watt or Thomas v. Thomas [1947] AC 484* ***(foll)***
*Wong Ah Sing v. Government of Singapore & Ors [1968] 1 MLJ 1* ***(refd)***
*Wong Tin Vui v. Patrick Midok & Anor [1975] 2 MLJ 260* ***(refd)***
*Wong Yee Cheong & Anor v. Toh Seng Chuan [1988] 2 MLJ 30* ***(refd)***
*Yahaya Mat & Anor v. Abdul Rahman Abu [1982] 1 CLJ 68* ***(refd)***
*Yap Yew Yee v. Subramaniam & Anor [1972] 2 MLJ 53* ***(refd)***

**Legislation referred to:**
Highway Code, rr. 18, 20, 22, 28, 56, 59, 60
Road Traffic Ordinance 1958, s. 59(4)
Road Transport Act 1987, s. 43

**Other source(s) referred to:**
*Bingham's Motor Claims Cases,* 6th edn, p 86
*Charlesworth On Negligence,* RA Percy, 5th edn, p 818

*For the appellants - Lai Kuan Jean; M/s Taye & Co*
*For the respondent - L Renganathan; M/s Loh & Renga*

*Reported by Farah Naim*

## JUDGMENT

### *Introduction*

On 23 May 1993 at about 11.30am an accident occurred between motorcycle no: JCW 4944 ridden by Chan Tenn Yeu – the respondent plaintiff and motorlorry no: JAW 4621 driven by Tabarani bin Mohd Arsad – the first appellant defendant as the servant or agent of Mohd Nasir bin Sampuro (T/A Mohd Nasir Enterprise) – the second appellant defendant. The learned sessions court judge ("trial court") apportioned the first appellant defendant's liability at 75% while the respondent plaintiff's blame was listed at 25%. On the basis of 100% liability, the trial court awarded general damages for the following injuries:

(1) Multiple abrasions and lacerations and degloving injury at RM5,000.

(2) Compound fracture of calcaneum and fracture of navicular and disabilities at RM15,000.

(3) Multiple scars and skin grafting at RM10,000.

The sum total came up to RM30,000 and with 10% overlapping the figure as computed by the trial court came up to RM27,000. The trial court too awarded an agreed special damages at RM1,542 and it further awarded RM2,896 as the costs of the specialist treatment. The parties were unhappy with the decision of the trial court. The appellants, who were the defendants before the trial court, appealed in regard to the liability; while the respondent, who was the plaintiff before the trial court, cross-appealed in regard to the quantum of damages.

There were two versions of the accident. One version came from the respondent plaintiff himself while the other version was that of the first appellant defendant. The trial court fell in error when it approached the case solely on the basis of deciding which story to be believed. When confronted with two conflicting versions, the duty of the trial court was to consider which version was inherently probable or improbable. The trial court should have been more meticulous and considered other probable versions provided they were within the scope and ambit of the pleadings and supportable by admissible evidence including the neutral ones. This approach provides a wide leverage for the trial court to manoeuvre bearing in mind, always, the testimony of the credible witnesses. Spenser Wilkinson J castigated the magistrate in *Koay Teik Choo & Ors v. Reg* [1956] 22 MLJ 52, for approaching the case upon the basis of which of the two conflicting stories he should believe. His Lordship remarked at p. 53 of the report that:

> One of the dangers of this approach is that it leaves entirely out of account the possibility (which in my opinion existed in a very high degree in the present case) that what has really been proved is something between the two stories.

In *Noorianti bt Zainol Abidin (F) & 8 Others v. Tang Lei Nge & Tang Lye Chang* [1990] 1 CLJ 943, Lim Beng Choon J had occasion to say that the trial judge should not approach the case on the basis of deciding which story out of the conflicting stories that should be believed, but rather to consider which version was inherently probable or improbable. All things being equal, it is trite law that if the version of one of the parties is inherently probable, then the judge has no choice but to accept that version forthwith (*Chua Chong Cher v. Teo Lang Keow & Ors.* [1970] 2 MLJ 27).

The principles governing the duties of an appellate court have been crystallised in a number of authorities. Foremost would be the decision of the House of Lords in *Watt or Thomas v. Thomas* [1947] AC 484, where Lord Thankerton at p. 487 to p. 488 succinctly said:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

Next, it would be the case of *Development & Commercial Bank Bhd v. Num Tjuan Sdn Bhd* [1989] 1 MLJ 475, a decision of the Supreme Court where Lee Hun Hoe CJ (Borneo) at p. 476 to p. 477 remarked:

> The learned judge had gone into the matter very carefully. He realized that the SAR had heard many witnesses and had the advantage of observing and hearing the witnesses. Normally, an appellate court would not disturb the findings of the lower court. It is of course the duty of an appellate court to be a judge of fact as well as of law. At the same time it would be abrogating its function if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on review of all the

evidence, it considered to be clearly wrong. The learned judge had given his reasons for disagreeing with the SAR.

Finally, it would be the case of *Sepang Omnibus Sdn Bhd v. Christina Loh Soo Pang & Ors* [1970] 2 MLJ 234 where the Federal Court speaking through Ong CJ had this to say at p. 236 of the report:

> To conclude, I think it is useful to remember the principles to be applied in appeals against apportionment of liability for contributory negligence. This has been succinctly stated by Lord Denning M.R. in *Kerry v. Carter* [1969] 1 WLR 1372, 1376 as follows:
>
> > We have been referred to cases on this subject, particularly in the case of *Brown v. Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at page 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v. National Smelting Board* [1961] 1 WLR 401, 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong.

These three authorities lay down a simple principle of law for an appellate court to follow. It is this. When a question of law has been tried by a judge and it is not suggested that the judge has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to the opinion of that judge as that judge saw and heard the witnesses, and consequently, the appellate court should not disturb the judgment of that judge unless it is plainly unsound. The appellate court is free to reverse the conclusions of the judge if the grounds given by the judge are totally unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in arriving at that decision the judge has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing together with the effect of the circumstances admitted or proved.

***The Facts And The Law And Its Assessments Thereto***

The accident happened at milestone 1, Jalan Sungai Pinggan, Benut, Pontian, Johore near to the junction as reflected in the sketch plan drawn by the investigating officer of the case one Inspector Chung Seng Yung (SP2). The sketch plan and the key to it are clearly seen at pp. 136 and 137 of the appeal record and its importance can never be doubted. As Syed Othman FJ said in *Multar v. Lim Kim Chet & Anor* [1982] 1 MLJ 184, 185 FC:

> The first respondent's report, on the other hand, is at variance with his evidence in court and the sketch plan. In the report he said he stopped the lorry when he heard someone knocking into the rear of the lorry. In court he said the motor-cycle collided with the right side of the lorry. The sketch plan clearly shows that the motor-cycle was at the right side of the lorry close to the right edge of the road with the front wheel almost near the driver's cabin of the lorry. From this we can only assume that the motor-cycle must have moved forward slightly after being hit by the lorry.

Of course, it goes without saying that the court is always justified in relying on the sketch plan and from it draw the necessary inferences as to who is liable (*Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82 FC). Now, reverting back to the mainstream of the case the respondent plaintiff's version was that he was riding the motorcycle no: JCW 4944 from Benut in the direction of Pontian and, at the material time, he was trailing behind a motorlorry no: JAW 4621 driven by the first appellant defendant. In other words both the motorcyclist and the lorry driver were travelling in the same direction, from Benut to Pontian. According to the respondent plaintiff when the motorcycle was about two vehicles behind the motorlorry, he gave a light signal intending to overtake the motorlorry on the right side of the road as he saw that there was no oncoming vehicle from the opposite direction. As the respondent plaintiff, who was riding the motorcycle, reached the middle portion of that motorlorry, suddenly the driver of that motorlorry turned to the right intending to enter the side road junction and the respondent plaintiff tried to avoid colliding into the motorlorry by swerving to the right but was unsuccessful. The motorcycle came in contact and collided into the front tyre of the motorlorry. It was the respondent plaintiff's stand that at all material times when he was trailing the motorlorry on his motorcycle and when he was overtaking the motorlorry, that motorlorry did not apply its signal lights to indicate that it was planning to turn to the right and enter the side road junction.

The version of the lorry driver went like this. He gave the light signals five street lights away before turning to the right. He looked to the side mirror and found that there was no vehicle behind him and he then turned to the right. While he was negotiating the turning to the right intending to enter the side road the motorcycle ridden by the respondent plaintiff came from the rear and collided into the front right tyre of the motorlorry.

The trial court believed and accepted the version of the motorcyclist without testing the discrepancies in the evidence of the respondent plaintiff with the mute evidence together with the evidence of Inspector Chung Seng Yung (SP2) to the effect that the respondent plaintiff was charged under s. 43 of the Road Transport Act 1987 for careless and inconsiderate driving. We do not know

as to the outcome of the charge levied against the respondent plaintiff as there was no material available in the appeal record. By way of an analogy, Raja Azlan Shah J (as His Majesty then was) in *Chock Kek Ling v. Patt Hup Transport Co. Ltd & Ors* [1966] 1 MLJ 120, 121 gave some weight to the evidence of pleading guilty to driving without due care and attention as an admissible admission and this was what his Majesty said:

> Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighs against the fourth defendant.

The case of *Lim Ah Toh v. Ang Yan Chee & Anor* [1969] 2 MLJ 194 lays down the same proposition of law, namely that the plea of guilt to the charge of inconsiderate driving is an admissible evidence. Must I therefore accept the fact that the respondent plaintiff was charged under s. 43 of the Road Transport Act 1987 as an admissible admission? Surely this piece of evidence would be an admissible admission which weighs against the respondent plaintiff bearing in mind that the charge under s. 43 of the Road Transport Act 1987 must have been instituted with the concurrence of the deputy public prosecutor. The trial court too failed to take into account that the police report that was lodged by the driver of the motorlorry – the first appellant defendant, was made 30 minutes after the accident with hardly any opportunity to concoct or fabricate. In the police report the first appellant defendant briefly said that he gave a light signal to turn to the right and as he was negotiating the turn, suddenly a motorcycle that came from the direction of the rear overtook and collided into the front tyre of the motorlorry. The motorcycle fell and he stopped his motorlorry and he saw the motorcyclist was lying on the side of the road. The version of the first appellant defendant in the police report tallied in material particulars with his testimony in court before the trial court. Clearly this was not the case where the first appellant defendant omitted to mention certain relevant facts in his police report. This was in fact the case of the first appellant defendant mentioning relevant facts in his police report.

At this juncture, it would be ideal to recall to mind the case of *Chock Kek Ling v. Patt Hup Transport Co. Ltd & Ors (supra)*, where the court there held that a police report cannot and will not contain everything under the sun. It was merely the first step to bring the police machinery into motion. Next, it would be the case of *Wong Ah Sing v. Government of Singapore & Ors* [1968] 1 MLJ 1, 2 where the court there held that if the defendant's story that the plaintiff went to the wrong side of the road was true, then the failure of the defendant to plead this fact in the defence and in the police report was said to be fatal. The relevance of the police report was also emphasised in *Haron*

*v. Macaulay* [1969] 1 MLJ 169 FC when the court took into consideration the failure of the appellant to mention in his police report that he had given a warning. Winslow J commented adversely in regard to an omission to state a material fact in the police report by the defendant in *Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor* [1976] 1 MLJ 252 CA in these words:

> His report does not help him at all. There never was any question whatsoever of oncoming traffic in that half of Guillemard Road and in that report he did not say one word about the motor-cyclist overtaking him or what their respective positions on the road were.

In *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85, Arulanandom J had this to say in regard to an ommission of material facts in the police report:

> In considering whether the plaintiff's version is the correct version, one has to take into consideration a few factors. The pillion rider Shahidi bin Yahya made a report immediately after the accident and in that report there was no mention of any car cutting across the path of the plaintiff and stopping. All he says in his report is: 'When we arrived at Simpang Chempa Lane, my friend collided into the rear of a motor taxi. I fell.' In the report of the plaintiff which was made about one month after the accident the plaintiff says:
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> > When I arrived near Mengkuang Road, a motor taxi came from my rear and overtook my motor-cycle and suddenly stopped in front of me. I applied my brakes but collided into the rear of the taxi and I fell down unconscious.

Mohamed Zahir J in *Wan Norsiah binte Wan Abdullah v. Che Harun bin Che Daud* [1980] 1 MLJ 237, 238, also emphasised the need to mention relevant facts in one's police report.

As I said there was no omission of incorporating material facts in the police report when the driver of that motorlorry lodged that report. All material particulars were incorporated and it tallied with the testimony of the driver of the motorlorry in court. In lodging that police report there was expediency on the part of the driver of motorlorry and this must be read favourably to his benefit. Lim Beng Choon J remarked in *Dewaramah a/p Ellapin Widow and Beneficiary of Subramaniam a/l Kaliappan v. Ibrahim bin Abdul Hamid and Anor* [1989] 1 CLJ 18, 21:

> More importantly, his testimony is corroborated by his report which he lodged at Gurun Police Station, Police Report No: 1956/76 (see p. 1 of the Further Agreed Bundle of Documents Exhibit 'B') about five minutes after the collision. Within that short interval of time, it is quite improbable that what he said in the report was an after-thought.

The trial court considered the brake marks of the motorlorry measuring 3 metres out of context. The trial court held the view that when the driver of the motorlorry was beginning to turn to the right and upon realising the presence of the motorcyclist, the lorry driver then applied the brakes and it was for this reason that the brake marks were seen on the road surface. In the sketch plan, "R" shows the brake marks and it is slanting to the right more towards the entrance of the side road. This clearly shows that the motorlorry had already turned to the right and about to enter the side road. This also shows that the motorlorry could not have sped because according to the driver of the motorlorry he applied his brakes immediately after the motorcycle collided into the front right tyre of the motorlorry. Put in another way, the version of the motorcyclist to the effect that the motorlorry suddenly turned to the right when the motorcyclist was at the centre of the body of the motorlorry while in the process of overtaking the motorlorry was not believable at all. It must be borne in mind that if the driver of the motorlorry only realised the presence of the motorcyclist when he was beginning to turn to the right then the brake marks would not be in a slanting position and it would not be nearer to the side road which was located to the far right. Another significant factor that was overlooked by the trial court was the fact that the motorlorry, at the material time, was carrying red earth and this can readily be seen in the police report lodged by the lorry driver (see p. 134 of the appeal record). The lorry driver himself in the witness box testified to the same effect (see p. 36 of the appeal record) and there was no rebuttal by either the motorcyclist or his counsel in regard to this point. Indeed with that heavy load, the motorlorry measuring 14 feet in length and moving on six tyres (see p. 30 of the appeal record) could not suddenly make a right turning as alleged by the motorcyclist.

According to the motorcyclist as he was about to overtake the motorlorry the distance of the motorcycle was about two motor cars away from the motorlorry and the motorcyclist was travelling at 70 kilometres per hour which was approximately 43.75 miles per hour (see p. 27 of the appeal record). The motorcyclist too admitted under cross-examination at p. 29 of the appeal record that he was travelling at 70 kilometres per hour before overtaking the motorlorry. According to *Bingham's Motor Claims Cases,* sixth edition, at p. 86, at 43.75 miles per hour the motorcycle was travelling at approximately 66 feet per second. The speed tables in *Bingham's Motor Claims Cases,* 6th edn have been referred to favourably by Choor Singh J in *De Cotta v. Tan Hock Lee* [1972] 2 MLJ 173, 174 and Mohamed Azmi J (as he then was) in *Yap Yew Yee v. Subramaniam & Anor* [1972] 2 MLJ 53, 55. Wan Suleiman J (as he then was) in *Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82 FC also referred to the braking tests in *Bingham's Motor Claims Cases* to determine liability. Finally, Seah J (as he then was) in *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61, 63 after referring to the conversion tables said:

> According to the conversion table, if a motorist is travelling at 20 miles an hour, he would be covering a distance of about 29 feet per second and applying this case, it would take about two seconds for the plaintiff's motor scooter to come into contact with the 2nd defendants' motorcar assuming that the plaintiff acted quickly. Speaking generally, when one is faced with an impending danger, one does not normally act immediately. The court should give some allowance for this. During these vital seconds, the plaintiff would be closing in fast onto the motorcar. It seems to me that the plaintiff would not be able to avert the collision even if he had slowed down to 20 miles an hour.

Thus, there is a continuing need to refer to the speed tables in *Bingham's Motor Claims Cases* in determining the liability of the protagonist in the accident drama. The motorcyclist too failed to abide by r. 22 of the Highway Code as it failed to trail behind the motorcyclist at a safe distance away. Rule 22 of the Highway Code states as follows:

> 22. If you collide with the rear of a vehicle in front of you it is your own fault and means that you have followed too closely. You should allow at least one car's length between your car and the car in front for every ten miles an hour of your speed. Thus at 30 m.p.h. there should be at least three cars' length between your car and the car in front.

On overtaking, r. 20 of the Highway Code states as follows:

> 20. The general rule is to overtake on the right of the vehicle in front. You may, however, overtake a vehicle on the left if the driver has signalled his intention to turn to the right and moved close to the centre of the road for that purpose, or where lines of traffic travel slowly side by side in lanes during peak periods in traffic when one lane may be held up while others proceeding on the left or right of it continued to move. This is not considered overtaking in the strict sense of the word.

and when the driver of the motorlorry signalled by light signals of his intention to turn to the right and when the body of the motorlorry had moved to the opposite side of the road in a slanting position, there was ample space to the left side of the road for the motorcyclist to manoeuvre and overtake the motorlorry. On the facts of the present appeal, a prudent motorcyclist should overtake the motorlorry when the driver of the motorlorry signalled his intention to turn to the right. But the motorcyclist, namely the respondent plaintiff was not prudent at all as he conveniently took the right lane to overtake the motorlorry that was turning to the right into that side road. No doubt, the court cannot demand that the motorcyclist be a perfectionist (*K.R. Taxi Service Ltd & Anor v. Zaharah & Anor* [1969] 1 MLJ 49, 53) yet there was failure on the part of the motorcyclist in the present appeal to be prudent and obey rule 20 of the Highway Code. The courts have in the past refer to the Highway Code to determine liability. Thus, in *Govinda Raju & Anor v. Laws* [1966] 1 MLJ 188, the court relied on r. 18 of the Highway Code which

provides that when turning left or right drivers must always give way to through traffic. In *M.A. Clyde v. Wong Ah Mei & Anor* [1970] 2 MLJ 183 FC, the court held that a breach of r. 28 of the Highway Code can be used to invoke s. 59(4) of the Road Traffic Ordinance 1958 raising a *prima facie* case of negligence. Hashim Yeop Sani J in *Chan Peng Fook v. Kan Pak Lee* [1974] 2 MLJ 197 succinctly said:

> We have evidence in this case the defendant saw the plaintiff walking in an unsteady manner about three feet from the edge of the road and there was certainly a possibility of the person wanting to cross the road. Under such circumstances there is a special duty to take precautions and the failure to take them is negligence. This is what section 25 of the Highway Code is all about.

In *Yahaya bin Mat & Anor v. Abdul Rahman bin Abu* [1982] 1 CLJ 68; [1982] 1 MLJ 202 FC, the respondent admitted that his vision was blurred because of the heavy rain and the open umbrella he was carrying in his right hand and the respondent even admitted that he had no time to avoid the oncoming taxi. The court found that the respondent was clearly in breach of the rules of the Highway Code – particularly rr. 56, 59 and 60 and these breaches were matters which should have been taken into consideration for the purpose of establishing liability under s. 59(4) of the Road Traffic Ordinance 1958. The court held that the trial judge had erred when it held that these breaches did not amount to negligence.

It is germane to note that the respondent plaintiff admitted at p. 29 of the appeal record that he was about five or seven cars away from the road junction before he overtook the motorlorry and the distance between the motorlorry and the motorcycle before overtaking was two cars away. The respondent plaintiff too admitted that while overtaking and when the motorcycle was proportionately at the centre of the body of the motorlorry, the driver of the motorlorry suddenly turned to the right. If this version was indeed true, the accident could not have happened because the motorcyclist would have overtaken the motorlorry since the speed of the motorlorry was about 50 kilometres per hour (approximately 31.25 miles per hour according to *Bingham's Motor Claims Cases*, 6th edn, at p. 86) – see p. 35 of the appeal record in regard to the speed of the motorlorry. Still relying on *Bingham's*, at 30 miles per hour the motorlorry would travel at 44 feet per second. Somehow the trial court too overlooked the fact that there was a total failure on the part of counsel for the respondent plaintiff to challenge the evidence of the lorry driver who categorically stated that the position of the motorlorry was already on the red laterite road in a slanting position when the accident occurred. Indeed Inspector Chung Seng Yung (SP2) under examination in chief at p. 23 of the appeal record categorically stated that the contents of the sketch plan, drawn by him, was the truth and there was no cross-examination launched

against the said Inspector to discredit him on this point. Thus, looking at the sketch plan the motorlorry in a slanting position has turned right and its front portion had entered the red laterite road. That being the case it would be next to impossible to believe the version of the motorcyclist that the motorlorry – bearing in mind its length and the load it carried, could have suddenly turned to its right. The sheer size of the motorlorry defy logic that the motorlorry could suddenly turn to the right to engage a turning into that red laterite side road. This was my judgment and I so hold accordingly.

The sketch plan showed the size of the road. From "B" to "C" the road measured 3.1 metres and this was the road which the motorlorry proceeded upon to go to Pontian with the motorcyclist trailing him from behind. The opposite direction of the road, at "C" to "D" also measured 3.1 metres in width and it was on this side of the road that the motorlorry was located after the accident with its front portion protruding into the red laterite road and at point "X" was the point of impact. The left side road at "A" to "B" measured 2 metres while the right side road at "D" to "E" measured 2 metres also. Calculation wise the side of the road where the motorlorry was travelling towards Pontion with the motorcyclist at its rear was indeed wide – approximately 10 feet wide. The road was straight and there was no oncoming traffic at all. A bulky motorlorry carrying red earth and giving light signals some five street lights away before turning to the right was quite conspicuous – clearly visible and striking to the eye. It must be quite a sight to behold. Trailing behind the motorlorry was the motorcyclist who admitted that he used to frequent that stretch of the road and he also admitted that he knew that along that stretch of the road there was a junction on the right side of the road. This was a case of the motorcyclist who was familiar with the road yet foolhardily opened himself to danger by taking a perilous course of action in overtaking the motorlorry when the driver of the motorlorry had given ample light signals and when the motorlorry had turned to the right – it must have been a slow turning bearing in mind its length and its weight. All these were done by the motorcyclist notwithstanding the fact that he knew that there was a small red laterite road on the right side of that stretch of the road. The negligence of the motorcyclist must be assessed higher than the driver of the motorlorry. I hold and it was my judgment that had the motorcyclist been more cautious, the accident would not have happened the way it did. There was ample space for the motorcyclist to overtake the motorlorry on the left side of the road – calculation wise the sketch plan provides a perfect guide, yet the motorcyclist took a perilous course of action by overtaking on the right side of the road right smack into the motorlorry that was turning into the right side road. This accident occurred on the opposite side of the road and not on the road where both vehicles were initially travelling in the direction of Pontian. In my judgment, the motorcyclist – respondent plaintiff must have

followed the motorlorry too close for comfort and in that position the motorcycle must have come within the "blind spot" of the motorlorry and it must be for this reason that the driver of the motorlorry did not see the motorcycle even though he looked at the side mirror. In the words of Lim Beng Choon J in *Dewaramah a/p Ellapin Widow and Beneficiary of Subramaniam a/l Kaliappan v. Ibrahim bin Abdul Hamid and Anor (supra)* particularly at p. 22 to p. 23:

> There is a limit as to how much a human eye could see. This is well illustrated in the case of *Ralph v. Bramly* (reported in *Bingham on All the Modern Cases on Negligence* 2nd Edition case 105) where Lodson L.J. said:
>
> > The human vision although it is very remarkable and takes in a very wide field, cannot take in everything at the same time. The driver has to look not only in front but to right and to left and in his mirror behind but cannot look at all these places at the same time. His primary duty is to look at the part of the road in which he is himself travelling. That does not mean that he is absolved from keeping observation even at the pavement as well as on the other half of the road. But that is really a matter of degree.

On overtaking, *Charlesworth On Negligence*, 5th edn by R.A. Percy, M.A. said at p. 818:

> The driver or rider of the overtaking vehicle, before attempting to overtake, should see that it is safe to do so, and should be specially careful at dusk or in fog or mist when it is more difficult to judge speed and distance (*Clark v. Wakelin* [1965] 109 SJ 295). A driver should not overtake at or when coming to a corner or bend, a road junction, a pedestrian crossing, the brow of a hill, a level crossing, a hump-backed bridge, or where the road narrows, when to do so would force another vehicle to swerve or to reduce speed or if double unbroken white lines or double white lines with an unbroken line nearest the driver have to be crossed or there is a NO OVERTAKING sign (*Joseph Eva Ltd v. Reeves* [1938] 2 KB, 893). Well before a driver overtakes, changes direction, slows down or stops, the rear mirror must be used then a signal given to give a clear indication of intention (Highway Code, para 31). In all cases it is the duty of the person overtaking to allow an adequate margin of safety between his vehicle and the vehicle overtaken, and to overtake only when he can do so without causing danger to other traffic (*Leaver v. Pontypridd U.D.C.* [1911] 76 JP 31; *Umphray v. Ganson Bros.* [1917] SC 371).

The plaintiff motorcyclist in *Kelly v. Easi-Life Products* [1954] CA 29B attempted to overtake the defendants' lorry as it was turning right. A collision occurred. The defendants' driver looked in the mirror, put out his right hand for thirty yards and started to turn and while turning did not look in the mirror again and took in his hand twenty yards before the place of turning in order to change the gear. The court held that the defendants' were not liable. Singleton LJ had this to say:

> I think he was entitled to assume, not merely in fact by putting out his hand but also from what he was obviously doing, moving to the centre of the road, that it must have been abundantly apparent to anyone who was coming up behind him that he was going to make the turn.

In *Preen v. Post Office* [1957] CA 30, the vehicle was twenty-feet long and it was turning right in a road measuring twenty-one feet wide. The driver gave a slowing down hand signal and then two hand signals of an intention to turn to the right, but nevertheless made the turning without ensuring that there was no vehicle immediately behind it. It was held that in view of the dimensions of the vehicle and the road, the turning vehicle was negligent. One-fifth negligence went to the turning vehicle while four-fifths went against the following vehicle whose driver never saw any of the signals.

In the present appeal there was ample cross-examination of the motorcyclist to the effect that he saw the driver of the motorlorry gave signals to turn to the right and this was also corroborated by the police report lodged by the lorry driver himself some 30 minutes after the accident. The lorry driver also testified to the same effect before the trial court. The sum total of this piece of evidence would place liability more at the door of the motorcyclist – the respondent plaintiff. Then there is the case of *Challoner v. Williams And Croney* [1975] 1 Lloyd's Report 124 CA which is of great interest. In that case, the plaintiff and the second defendant were travelling in the second defendant's car from Oxford to Luton along Icknield Way. The first defendant was also travelling in the same direction but realised that he had taken a wrong turning and decided to turn back. He had been driving in the centre of the left hand carriage way and in order to turn, he slowed down, and moved out towards the centre of the road to make a right hand turn. He did not see the second defendant's car overtaking. The second defendant crashed into the first defendant's car and the plaintiff was injured. The plaintiff brought an action against both the defendants claiming damages. Shaw J held that both the defendants were equally liable and on the issue of apportionment, each were said to be equally to blame. The first defendant appealed on the ground that he was not guilty of negligence and that the whole blame and liability for the accident rested on the second defendant. The Court of Appeal judges (Megaw and Ormrod LJJ and Cumming-Bruce J) held that in the circumstances the first defendant was not liable for negligence causing the accident and that the whole of the responsibility rested with the second defendant. The appeal was thus allowed and leave to appeal to the House of Lords refused.

Another interesting case would be that of *Thompson v. Spedding* [1973] RTR 312 and the facts may be stated as follows. The defendant, the driver of a car travelling in a "procession" on a busy road, braked suddenly in order to turn right. The car behind him also braked sharply and avoided collision with

him, but the plaintiff, riding a motor scooter behind the second car, was unable to avoid running into it and was injured. In an action by her against the defendant for damages, the judge found that the defendant had been negligent, and that the plaintiff was not to blame for the accident and awarded damages accordingly. On appeal by the defendant, it was contended that the judge should have found that the plaintiff had been guilty of contributory negligence. In allowing the appeal, the Court of Appeal held that it was the duty of persons who were driving in a line of traffic to drive at such a distance behind the car in front as to be prepared for reasonable emergencies which arose. The Court of Appeal too held that the plaintiff had been guilty of contributory negligence and that the fault of the parties should be assessed as equal and the damages awarded to the plaintiff was reduced by one half.

It was held in *De Cotta v. Tan Hock Lee (supra)* that there was a duty on drivers following a leading car to driver in such a fashion so as to avoid accidents rising out of exigencies of the leading car. It was further held that the duty was a continuing duty which exists independently of negligence of the leading driver.

Lord Justice – Clerk Cooper in *Brown & Lynn v. Western SMT Co. Ltd* [1945] SC 31 remarked:

> The conduct of the leading driver will, of course, have an important bearing upon liability for an accident in every case in which the conduct of both drivers is put in issue, either by a plea of contributory negligence or by double allegations of fault. But the duty of the following driver is a continuous duty which persists independently of any actual emergency or of the leading driver's reaction to such emergency, and the question whether the following driver has failed in his duty cannot depend upon whether the leading driver has fulfilled his ... The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors – their speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up, and many other things. The following driver is, in my view, bound, so far as reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated; but whether he has fulfilled this duty must in every case be a question of fact, just as it is a question of fact whether, on any emergency disclosing itself, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances ...

All these authorities serve as useful guidelines. In my judgment, the facts and the law would indicate that there was contributory negligence on the part of the motorcyclist – respondent plaintiff on a higher scale in terms of percentage as compared to the driver of the motorlorry as he ought reasonably to have

foreseen that, if he did not act as a reasonable and prudent man, he might hurt himself (*Jones v. Livox Quarries Ltd* [1952] 2 QB 608, 615). On contributory negligence and to establish contributory negligence it is not necessary to show that the negligence of the plaintiff constituted a breach of duty towards the defendant; it is sufficient to show that a lack of reasonable care for the plaintiff's own safety was the cause of the injury (*Davies v. Swan Motor Co. (Swansea) LD James, Third Party* [1949] 2 KB 291 CA). According to Inspector Chung Seng Yung (SP2), there was no damage to the motorlorry at all. The motorcycle had its handle twisted and its petrol tank dented. The front lights of both the motorlorry and the motorcycle were not broken at all. That the motorlorry was "damage free" was an important factor to be taken into account for the benefit of the lorry driver. This was not done by the trial court. This was a case of the motorcyclist overtaking the motorlorry when the driver of motorlorry was turning the motorlorry to the right in order to enter the side road. This was a case of the driver of the motorlorry who had given light signals five street lights away before turning to the right and yet the motorcyclist ignored it and took a perilous course of action by overtaking the motorlorry on its right side. This was a case of a foolhardy motorcyclist who was familiar with that stretch of the road and who knew that there was a junction on the right side of the road, yet he was willing to take the risk by overtaking on the right side of the motorlorry. Without a doubt, the motorcyclist was the author of his own misfortune. Had he overtook the motorlorry on the left side of the road, he would not be in the present predicament.

For the reasons adumbrated above, the appeal by the appellants defendants in regard to liability was allowed. This meant that the driver of the motorlorry – the first appellant defendant was 25% liable while the motorcyclist – the respondent plaintiff, the principal actor in the whole episode, was 75% liable.

***Quantum Of Damages***

The purpose and purport of awarding damages is to award the victim compensation for the wrong committed by the wrong doer. Syed Agil Barakbah FJ in *Ong Ah Long v. Dr. S. Underwood* [1983] 2 MLJ 324 at p. 334 remarked as follows:

> It must be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate.

Damages are classified as general and special damages. After the plaintiff succeeds in establishing liability he must prove damages and if he is unable to prove damages, he gets only nominal damages (*Guan Soon Tin Mining Co. v. Wong Fook Kum* [1969] 1 MLJ 99, 100, 103). Damages awarded to the victim is in the form of a civil remedy and its aim is simply to put the injured party to his original position, as far as is humanly possible, by monetary means. In short, the compensation is strictly monetary.

The driver of the motorlorry escaped unhurt. According to the motorcyclist he was initially treated at the Benut district clinic and then hospitalised at the Pontian district hospital. He was then sent to the Sultanah Aminah general hospital for treatment. On his own accord, he left the Sultanah Aminah general hospital and proceeded to the Chew Orthopaedic Clinic and Surgery at Wisma Maria, Johor Bahru for treatment. Before the trial court, Dr. Aruljoethy s/o Ratnasingam ("Dr. Arul") from the Puteri Specialist Hospital testified on behalf of the motorcyclist. Dr. Arul examined the motorcyclist on 24 August 1994 and prepared a medical report. In his medical report, Dr. Arul stressed that the present problems of the motorcyclist were his inability to walk normally and his inability to squat. In his medical report, Dr. Arul proceeded at length to describe the medical impediments of the motorcyclist in these words:

> **On Examination**
>
> Patient walks without aid. He is unable to squat normally. There is a scar on his (L) heel posteriorly that is 13 x 4cm that has healed after skin grafting.
>
> There is a scar on the dorsolateral aspect of his (L) foot with a depression and is 8 x 6cm.
>
> There is a scar 16 x 5.5cm on his (L) leg that has healed after skin grafting.
>
> There is a scar 22 x 18cm on his (L) thigh that is the donor site for skin grafting.
>
> There is a scar 1 x 9cm on the (L) inguinal region.
>
> **Movements**
>
> Dorsiflexion at the (L) ankle is markedly reduced by 20 percent as compared to the right side.
>
> Movement at the knee and hip is normal.
>
> **Measurements**
>
> The circumference of the (R) thigh is 50cm wheareas the (L) is 48cm. The (R) calf is 34cm in circumference whereas the (L) is 33cm. Both lower limbs are of equal length. Sensation is reduced on the dorsum of the (L) foot and over the (L) heel region.
>
> He is unable to dorsiflex the small toes. The big toe is normal.

**Radiological Examination**

There is evidence of a fracture of the (L) calcaneum on the anterior half. The fracture has united with irregular surface. There is also a chip fracture of the (L) navicular bone.

**Opinion**

Mr. Chan Tenn Yeu was involved in a road traffic accident and sustained a compound fracture of the (L) calcaneum and a chip fracture of the (L) navicular bone. All the scars are permanent.

There was skin loss over the calcaneum (heel) and the dorso-lateral aspect. After prolonged treatment there is skin cover and the fracture has united. The skin covering the heel is thin skin. As such it cannot stand the normal wear and tear like the normal sole of the foot. Hence he needs a special shoe to pat the foot. This disability is permanent.

The depression on the dorsolateral aspect of the (L) foot is permanent. The loss of sensation of his foot is permanent.

He is unable to dorsiflex his lateral four toes. It is probably due to cut tendons to the foot and loss of muscles. This disability is permanent.

He has loss of ankle dorsiflexion by about 20 percent. This disability is permanent. It is due to this that he is unable to squat normally.

He will not be able to walk barefooted as this will damage the heel skin.

The wasting of the muscles of his thigh and calf is permanent.

He was a ceiling maker prior to the accident. But he will not be able to do it due to the poor heel skin and loss of movement. He will not be able to climb ladders.

Chew Orthopaedic Clinic and Surgery prepared a medical report on the motorcyclist. That medical report reads as follows:

Chan Tenn Yeu was involved in a road traffic accident on this date and was admitted to Hospital Sultanah Aminah, Johor Baru. He seeked treatment at Medical Specialist Centre, Johor Baru on the 16.8.94 for a complaint of pain left heel and unable to extend his left foot and toes. Examination on arrival revealed a conscious, alert and well orientated Chinese male adult with the following injuries;

1. Compound fracture left calcaneum with skin loss and osteomyelitis of the left calcanean noted.

2. Cut tendon to the left 2nd, 3rd, 4th and 5th extensor tendons of the toes – infected.

Patient was treated with antibiotics and the left heel was skin-grafted on the 23.8.93. Tendon repair of extensor tendon left foot will be required at the later stage.

Patient was last seen on the 25.10.93.

The medical report of Dr. Saidatun Nisak Derwis from the Pontian district hospital dated 21 August 1993 was the earliest medical report on the condition of the motorcyclist. It was worded as follows:

Sustained: – Multiple abrasions.
Laceration Left knee 5cm x 2cm.
Degloving injury lateral aspect of Left foot.
Laceration with flap tissue Left heel.

X-ray of Left foot revealed crushed fracture of the calcaneum.

Patient was sent to Hospital Sultanah Aminah Johor Bahru for further management.

The Sultanah Aminah general hospital by its medical report dated 24 November 1993 gave the following write-ups:

Initial Injury Report On:

| | | | | | |
|---|---|---|---|---|---|
| Name | : | Chan Tenn Yeu | Age | : | 19 yrs |
| Sex | : | Male | I.C | : | 2691509 |
| R.N | : | 23697 | O.N | : | 3451/93 |
| D.A | : | 23.5.93 | D.D | : | 07.6.93 |

This is to certify that the above named was admitted to this hospital and the following findings were recorded.

Clinical summary:
Patient had alleged road traffic accident on 23.5.93 with the following injuries noted;

1. Open fracture left calcaneum.
2. Chip fracture left navicular.
3. 2 deep lacerated wound left leg.

Treatment:
Wound debridgement and immobilisation of left foot was done on 24.5.93, medication including antibiotics was given and dressing managed regularly. His wound improved and clean on discharged.

Progress:
He was followed up on 12.6.93, 26.6.93, 17.7.93 and 4.8.93. On his last follow-up the wound was healing as expected and granulating well. We lost him on follow up after 4.8.93.

Thank you.

The motorcyclist himself agreed that he continued to visit the Sultanah Aminah general hospital on follow-up visits on only four occasions and thereafter he stopped entirely. The motorcyclist too agreed that he received proper medical care and treatment from the Sultanah Aminah general hospital and he would have saved a lot of money had he not proceeded to the Chew Orthopaedic Clinic and Surgery for treatment. What was apparent in the medical report of the Sultanah Aminah general hospital was that the wound sustained by the motorcyclist was healing as expected by the doctors there and that wound was granulating well. When the motorcyclist testified before the trial court he gave his occupation as a driver of an excavator (see p. 25 of the appeal record), while Dr. Arul described the motorcyclist's occupation as a ceiling maker in his medical report. Clearly, therefore, notwithstanding the injury to his left leg, the motorcyclist was gainfully employed at the time he gave evidence before the trial court.

In *Red And Yellow Omnibus Co. Sdn Bhd & Anor v. Chuah Lay Boon* [1993] 2 CLJ 480, 482, I made the following observations:

> Certain principles which are well established need to be emphasised in an appeal on quantum of damages. The appeal court would be slow to interfere with the trial Court's finding unless (1) there has been a wholly erroneous estimate of damage, or (2) the trial court has omitted some relevant consideration or admitted some irrelevant consideration, or (3) the amount is so excessive or insufficient, as to be plainly erroneous. The appeal court should avoid interfering merely because it thinks that if the case had been before it in the first instance, it would have awarded a lesser sum.

Wan Suleiman FJ (as he then was) in *Rasidin bin Partorjo v. Frederick Kiai* [1976] 2 MLJ 214, 215 laid down the following principles:

> A Court of Appeal always starts with the working presumption that any decision appealed against is right in every respect. So to succeed in an appeal the appellant must convince us that the decision appealed from is wrong. If we are not so convinced, the appeal fails.
>
> The principle upon which an appellate court will interfere with an award of damages made by a judge sitting alone has been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at pages 616-617 as follows:

> Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint v. Lovell.* In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

> Thus the appellant here has to convince us that the learned trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damage suffered.

Syed Agil Barakbah FJ, speaking for the Federal Court in *Ong Ah Long v. Dr. S. Underwood* (*supra* – at p. 334) remarked succinctly:

> The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant. (Per Sir Alexander Cockburn, LJ in *Phillips v. South Western Railway Co.* [1879] 4 QBD 406).

That brilliant judge Mohamed Azmi FJ in *Tay Tong Chew & Anor v. Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50 FC set the pace for standardising of damages in these words (see p. 54 of the report):

> Although it is almost impossible to standardize damages for pain and suffering and loss of amenities in running down cases, it is in the interest of all concerned that the trend of awards should be maintained so that Insurance Companies and practitioners have some idea as to how these cases will ultimately be dealt with here. This will facilitate out of court settlement or at least agreement on quantum and will no doubt benefit road accident victims (see *Seenivasan & Anor v. Lim Yew Seng* [1961] MLJ 22). The learned Commissioner did not seem to consider adequately the authorities cited before him. Nor did he give any indication as to how he had arrived at his estimate. Had he done so we might probably have found it difficult to disturb his assessment.

An element of overlapping must not be overlooked. Suffian FJ in *Mohamad bin Mohamad Said & Anor v. Perianayagam & Anor* [1972] 1 MLJ 67 FC in style said at p. 68 of the report:

> With respect we do not think that the learned judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just have added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher v. Autocar and Transporters Ltd* [1968] 1 All ER 726, 733. There is an element of overlapping when two or more injuries are suffered simultaneously.

With these principles in mind, I will now proceed to examine the award of damages as awarded by the trial court. Miss Lai Kuan Jean, learned counsel for the appellants defendants, urged me not to disturb the award by the trial court as that award was said to have taken into account the element of overlapping and it was an award that kept with the current trend. Mr. L. Renganathan, learned counsel for the respondent plaintiff, argued that the damages awarded were too low.

***Multiple Abrasions And Lacerations And Degloving Injury***

The motorcyclist sustained "multiple abrasions, laceration left knee 5cm x 2cm with laceration of the flap tissue left heel and degloving injury lateral aspect of left foot." Degloving injury was said to be a complete peeling of the top skin and this was indeed serious as compared to laceration. Eusoff Chin J (now Chief Justice of the Federal Court of Malaysia) in *Wong Yee Cheong & Anor v. Toh Seng Chuan* [1988] 2 MLJ XXX awarded RM2,000 for multiple lacerations and abrasions. In *Sulaiman bin Chik v. Ang Ah Choo* [1989] 2 CLJ 492, 498, Mohd. Dzaiddin J (now FCJ) for:

| | |
|---|---|
| (1) Lacerations over | (a) (L) Pariental region 1½".<br>(b) eye over the canthus 1". |
| (2) Abrasions over | (a) (L) Scapula 8" x 4".<br>(b) (L) Hip 2" x 3". |

awarded RM3,500. In *Ooi Huah Beng v. Nizarullah bin Ahmad* [1994] MMD 683, Abdul Hamid Mohamed J awarded RM3,000 for lacerations and abrasions.

For degloving, the Singapore High Court in *Low Ah Whatt v. Phua Cheok Siong* [1977] 2 MLJ xci awarded S$7,500 and it was in regard to degloving injury of the right forearm. This is an authority from across the causeway where the cost of living had all along been on the high side and it is an old authority – about 22 years ago.

Dr. AL Annamalai in his medical report as contained in the additional appeal record dated 14 May 1996 stated that the motorcyclist sustained degloving injury at the left retro-calcaneal area of the left heel. The degloving injury must be very painful. The top skin was completely peeled off. On the basis of these comparables, I awarded the motorcyclist under this head a sum of

RM13,000. This sum constituted an enhancement of the award of the trial court as the trial court had clearly made a wholly erroneous estimate and failed to lay emphasis on the degloving injury.

***Compound Fracture Of Calcaneum And Fracture Of Navicular And The Attendant Disabilities***

Dr. Saidatun Nisak Derwis in his medical report showed that an x-ray of the motorcyclist left foot was undertaken and it revealed a crushed fracture of the calcaneum. The good doctor from the Sultanah Aminah general hospital also noted that there was an open fracture of the left calcaneum. Chew Orthopaedic Clinic and Surgery noted that there was compound fracture at the left calcaneum with skin loss and osteomyelitis of the left calcaneum. Dr. Arul was also of the view that the motorcyclist sustained a compound fracture of the left calcaneum. Dr. AL Annamalai stated in his medical report that the x-ray showed that the fracture of the calcaneum had malunited. Of signficant to note would be the x-ray of the left midfoot conducted by Dr. AL Annamalai and he said in his medical report that "there is no evidence of fracture of the navicular bone." It must be borne in mind that Dr. AL Annamalai examined the motorcyclist on 14 May 1996 – it was some years after the accident. In *Khoo Lai Beng v. Syarikat Binaan Noriswaty Sdn Bhd (Koh Kok Boon & Anor., Third Parties)* [1988] 2 MLJ XXIX, Malek Ahmad J (now JCA) awarded RM18,000 for (a) trimalleolar fracture of the right ankle and (b) a 10cm by 6cm laceration of the right ankle. It must be noted that the trimalleolar bone is the side bone on the ankle and it is smaller than the calcaneum which is the heel bone. In *Mohamed Nordin bin Mohamad Zahari & Anor v. Kerajaan Malaysia & Anor* [1993] 4 CLJ 451, for the fracture of the right medial malleolus, I awarded a sum of RM15,000. In *Ravindran s/o Veerasamy & Satu Lagi v. Harun bin Salleh* [1993] 1 CLJ 23, the plaintiff there sustained, *inter alia*, fracture of the right medial malleolus with the following residual disabilities:

(i) osteoarthritis and subsequently required an arthrodesis;

(ii) swelling of the right foot;

(iii) complete stiffness of the right ankle;

(iv) difficulty in climbing stairs and ladders; and

(v) stiffness of the right big toe.

and Abdul Hamid Mohamed J awarded RM35,000. In the present appeal, the motorcyclist had a skin loss over the calcaneum (heel) and the dorso-lateral aspect. The skin covering the heel was said to be a thin skin and as such he needed a special shoe to pat his foot and this disability was said to be

permanent. The depression on the dorso-lateral aspect of the left foot was said to be permanent. The loss of sensation to the motorcyclist's foot was also said to be permanent. The motorcyclist too was unable to dorsiflex his lateral four toes and this was due to the cut tendons to the foot and loss of muscles and it was said that this too was permanent. The initial fracture of the navicular bone must have healed as the x-ray conducted by Dr. Al Annamalai clearly indicated that it must have been so. There were permanent disabilities in the case of *Ravindran s/o Veerasamy & Satu Lagi v. Harun bin Salleh (supra)*, in the following areas:

(i) shortening of 4cm - limping gait;

(ii) bend knee only 0-45 percent - normal 0-160 percent;

(iii) moderate wasting of muscle;

(iv) abduction of right hip only 30 percent - normal being 50 percent;

(v) right ankle - dorsiflexion 0 percent.

Under this head, the trial court awarded RM15,000 and I saw no reason to disturb this quantum at all. I affirmed this award unhesitantly as it was just and reasonable and it would not bring about ruinous consequences to the appellants defendants.

***Multiple Scars And Skin Grafting***

The motorcyclist had scars on his left heel posteriorly measuring 13cm x 14cm which had healed after skin grafting. There was also a scar on the dorso-lateral aspect of the left foot with a depression and it measured 8cm x 6cm. A scar measuring 16cm x 15.5cm on the motorcyclist left leg had healed after skin grafting. There was also a scar measuring 22cm x 18cm on the left thigh, which was the donor site for skin grafting. At the left inguinal region a scar measuring 1cm x 9cm appeared. Without a doubt, there were multiple scars and skin graftings performed on the motorcyclist. These skin graftings proved successful. In *Azman bin Kasri & Anor v. Md Isa bin Endut & Kerajaan Malaysia* [1988] 2 MLJ xxviii, a sum of RM10,000 was awarded for skin grafting. In *Wong Yee Cheong & Anor v. Toh Seng Chuan (supra)*, for permanent scars the sum awarded was RM8,500.00. The trial court under this head awarded RM10,000 and I have no quarrel with this award. I confirmed the award accordingly.

The sum total of all these general damages came up to RM38,000 (RM13,000 + RM15,000 + RM10,000). With overlapping of 10%, the grand total came up to RM34,200 (*Phuah Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 186, 188 CA). In my judgment, the award of general damages for the present appeal

certainly kept in line with the times. The purchasing power of our Malaysia ringgit was a factor in deciding the quantum for the present appeal (*Phuah Jee Suan v. Nila Vasu Pillai (supra)*; *Wong Tin Vui v. Patrick Midok & Anor* [1975] 2 MLJ 260; *Lee Yew Hoe v. Lee Bock Huat* [1980] 2 MLJ 271; and *Liong Thoo v. Sawiyah & Ors* [1982] 1 MLJ 286). The comparables cited in this judgment certainly went a long way in assessing the general damages in the present appeal (*Ngooi Ku Siong & Anor v. Aidi Abdullah* [1985] 1 MLJ 30 FC).

Accordingly, for the reasons adumbrated above, the cross-appeal by the respondent plaintiff in regard to the general damages was allowed to the extent as alluded to in the preceding paragraph of this judgment.

I have apportioned liability for the appellants defendants at 25% while the respondent plaintiff at 75% and, consequently, the quantum for the general damages would be apportioned in that order. This was my judgment and I so hold accordingly.

***Special Damages***

Lord Goddard in *British Transport Commission v. Gourley* [1956] AC 185 at p. 206 succinctly said:

> In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earning incurred down to the date of trial, and is generally capable of substantially exact calculation ...

I have no intentions to disturb the agreed special damages and the award for the cost of the specialist treatment awarded by the trial court. I affirmed, under this head, the awards of the trial court forthwith.

***Costs And Interest***

Costs is discretionary and it will remain so for a long time to come. As the appellants defendants succeeded in their appeal on liability, costs should rightly go to them. The respondent plaintiff secured partial success on quantum in his cross-appeal and he should be given half-costs accordingly (*P.R. Panickar v. Chwee May Kwong & Anor* [1958] 24 MLJ 136, 138) and with the usual interest thereto.